Supreme Court, U. S.
FILED
APR 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1284

JOHN S. EDMUNDS,

Petitioner,

—v.—

ROBERT WON BAE CHANG,
Judge, First Circuit Court,
State of Hawaii,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MELVIN L. WULF
American Civil Liberties
Union Foundation
22 East 40th Street
New York, N.Y. 10016
Attorney for Petitioner

EDWIN J. OPPENHEIMER, JR.
On the Brief

TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Question Presented 2

Constitutional Provision and Statutes Involved 2

Statement of the Case 3

Reasons for Granting the Writ 7

1. The Decision Below Has Decided An Important Question Regarding The Scope Of Federal Habeas Corpus Relief In A Way In Conflict With Applicable Decisions Of This Court 7

2. Certiorari Should Be Granted Because The Decision Below Is In Conflict With Decisions Of The Fourth And Second Circuits 13

Conclusion 16

Appendices:

Opinion of the United States Court of Appeals for the Ninth Circuit 1a

Opinion of the United States District Court for the District of Hawaii 8a

Page

Memorandum Decision of the
United States Court of Appeals
for the Fourth Circuit 26a

TABLE OF AUTHORITIES

Cases — Page

Braden v. Kentucky, 410 U.S. 484 (1973) 8, 10

In Re Butts, 493 F.2d 842 (5th Cir. 1974) 11, 12

Carafas v. LaVallee, 391 U.S. 234 (1968) 8

Feliciano v. Laird, 426 F.2d 424 (2nd Cir. 1970) 11

Hensley v. Municipal Court, 411 U.S. 345 (1973) 8, 10

Jones v. Cunningham, 371 U.S. 236 (1963) 7

Jones v. United States, ___ U.S. ___, 42 L.Ed.2d 150 (1974) 12

Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969) 12

Maness v. Meyers, ___ U.S. ___, 42 L.Ed 2d 574 (1975) 8, 9

Peyton v. Rowe, 391 U.S. 54 (1968) 8

State of Hawaii v. James Pokini, et al., Cr. No. 44262 (Circuit Court of the First Circuit, State of Hawaii) 3

Strait v. Laird, 406 U.S. 341 (1972) ... 8

Cases — Page

Thames v. Justices of Superior Court, 383 F.Supp. 41 (D. Mass. 1974) 15

Thistlethwaite v. City of New York, 497 F.2d 339 (2nd Cir.), cert. den., ___ U.S. ___, 43 L.W. 3359 (Dec. 23, 1974) 13, 15

United States ex rel. Horelick v. Criminal Court, 507 F.2d 37 (2nd Cir. 1974) 13, 14

United States ex rel. Radich v. Criminal Court, 385 F.Supp. 165 (S.D.N.Y. 1974) 10, 15

Walker v. Dillard, ___ F.2d ___, No. 73-1108 (4th Cir. June 20, 1973) 11, 13

Walker v. Dillard, 353 F.Supp. 566 (W.D. Va. 1972) 13

Statutes and Bills

28 U.S.C. §1254(1) 2

28 U.S.C. §2241 2

28 U.S.C. §2254 2

28 U.S.C. §2254(a) 7

Hawaii Penal Code §1077 5

Act 9, Session Laws of Hawaii, 1972 5

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. .....

JOHN S. EDMUNDS,

Petitioner,

-v.-

ROBERT WON BAE CHANG,
Judge, First Circuit Court,
State of Hawaii,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 2, 1975.

OPINIONS BELOW

The judgment of the Court of Appeals reversing the decision of the district court is reported at 509 F.2d 39 and is set forth in the Appendix, infra, pp. 1a - 7a. The opinion of the district court granting habeas corpus relief is reported at 365 F.Supp. 941 and is set out in the Appendix, infra, pp. 8a - 25a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 2, 1975. On April 10, 1975, Mr. Justice Brennan signed an order extending the time to file this petition up to and including April 12, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Whether the imposition of a fine as a sentence for criminal contempt without an additional sentence to confinement is insufficient to constitute "custody" within the meaning of the federal habeas corpus statutes, 28 U.S.C. §§2241 and 2254.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States and Chapter 153 of Title 28, United States Code (28 U.S.C.§§2241, 2254).

STATEMENT OF THE CASE 1/

On January 23, 1973, petitioner, an attorney, was representing a defendant in a state criminal trial 2/ in which the respondent was judge. As court opened, the following colloquy between petitioner and respondent occurred (App., infra, pp. 16a - 17a):

> "BAILIFF: The Court of the Honorable Robert Won Bae Chang is now in session. Please be seated.
>
> THE COURT: Please be seated.
>
> MR. EDMUNDS: Your Honor, --
>
> THE COURT: Please be seated.
>
> MR. EDMUNDS: Your Honor, I have an --
>
> THE COURT: Please be seated, Mr. Edmunds.
>
> MR. EDMUNDS: -- issue I would like to raise.
>
> THE COURT: The Court orders you to be seated, Mr. Edmunds.
>
> MR. EDMUNDS: Your Honor, I'd like the record --

1/ The statement of the case is taken substantially from the opinions below.

2/ State of Hawaii v. James Pokini, et al., Cr. No. 44262 (Circuit Court of the First Circuit, State of Hawaii).

THE COURT: If you do not be seated right now, Mr. Edmunds, the Court will find you in contempt of Court.

MR. EDMUNDS: May I approach the bench, your Honor?

THE COURT: You are found in contempt of Court, Mr. Edmunds. The Court will stand at recess."

It is undisputed that at all times petitioner spoke in a "low and courteous tone." App., infra, p. 24a. Furthermore, the Court below observed (App., infra, p.5a):

> "Of the six judges who have reviewed the facts claimed to constitute the contempt (the district judge and five justices of the Hawaii Supreme Court), three held the conduct contemptuous and three held it was not. Were we to reach the merits here, we might have considerable difficulty labelling the determination of the district court (that the conduct was not contemptuous) clearly erroneous."

Later, on the day of the twenty-third, petitioner was served with an order holding him in criminal contempt and directing him to pay a fine of twenty-five dollars within forty-eight hours. The judgment contained no sentence to confinement. Before the expiration of that time, petitioner moved respondent to reconsider his judgment. No action was ever taken on that motion. App., infra, p.10a. On January 29, 1973, petitioner was ordered to appear before respondent four days later to show cause why he should not be held in further contempt for failure to comply with the original contempt order. Petitioner

then sought a writ of prohibition from the Hawaii Supreme Court.3/ That court restrained respondent from proceeding further while it considered the writ. When the Hawaii Supreme Court denied the writ 4/ petitioner applied to the United States District Court for the District of Hawaii for a writ of habeas corpus to review the lawfulness of the contempt. The district court issued a restraining order against respondent and ultimately issued the writ. Respondent appealed to the United States Court of Appeals for the Ninth Circuit which reversed the district court on the jurisdictional question which is presented here for review:

> "The primary question on this appeal is whether a person against whom a fine has been imposed by a state court is "in custody" within the meaning of the federal habeas corpus statute, 28 U.S.C. §§2241, 2254. The district

---

3/ There is no direct appellate review of criminal contempt sentences under Hawaii state court procedure. See, Hawaii Penal Code §1077(5); Act 9, Session Laws of Hawaii, 1972.

4/ The 3-2 decision of the Hawaii Supreme Court denying the writ of prohibition is reported at 54 Hawaii Rep. ___, 512 P.2d 3 (1973). There is no question that petitioner has exhausted his state remedies. App., infra, p.11a.

court, concluding that he is, proceeded to the merits of petitioner Edmunds' claim and granted a writ. 365 F.Supp. 941 (D. Hawaii 1973). We disagree on the jurisdictional question and, accordingly, reverse." App., infra, pp. 1a -2a.

"...we conclude that there is insufficient "custody" present for the invocation of habeas corpus relief; the claimed restraints on Edmunds' liberty are neither severe nor immediate enough to justify the remedy." App., infra, p. 3a.

"We trust that whatever Congress meant by the word "custody" when it enacted the habeas corpus statute, it did not intend to authorize federal intervention into state judicial proceedings to review a "fine only" sentence. The custody requirement exists to distinguish between "severe restraints on individual liberty" and those which are not severe. If the latter category does indeed exist, we are clear that a "fine only" sentence falls within it." App., infra, p. 6a. (footnotes omitted).

Execution of the state court judgment has been restrained by a series of orders from the various courts involved, the last order being a stay of mandate issued by the Court below on March 4, 1975.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Has Decided An Important Question Regarding The Scope Of Federal Habeas Corpus Relief In A Way In Conflict With Applicable Decisions Of This Court.

If permitted to stand, the decision will severely contract the scope of federal habeas corpus. It will mean that a state court determination of important federal questions adverse to a defendant will be immune from any judicial review in a federal forum except possibly by certiorari or appellante jurisdiction in this Court following the conclusion of state court appellate remedies. Under the decision below, federal habeas corpus does not lie to review a federal constitutional claim where a defendant was sentenced only to a fine irrespective of the egregiousness of the constitutional error committed by the state court.

28 U.S.C. §2254(a) provides that the writ of habeas corpus is available to:

> "...a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

As this Court observed in Jones v. Cunningham, 371 U.S. 236, 288 (1963), construing this statute, it

> "...does not attempt to mark the boundaries of 'custody' nor in any way other than the use of that word

to limit the situations in which the writ can be used."

The decision below, in sanctioning less, represents a retreat from the increasingly expanded interpretation which this Court has afforded the reach of the Great Writ. See, e.g., Peyton v. Rowe, 391 U.S. 54 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); Strait v. Laird, 406 U.S. 341 (1972); Braden v. Kentucky, 410 U.S. 484 (1973); Hensley v. Municipal Court, 411 U.S. 345 (1973).

The decision below also is at odds with the attitude expressed by this Court in Maness v. Meyers, ___ U.S. ___, 42 L.Ed.2d 574 (1975), decided after the decision below.

Maness was one of two attorneys held in contempt for misconduct: "(T)he court held petitioner [Maness] and his co-counsel [Maley] in contempt, as well as their client, and fixed punishment for each of them..." 42 L.Ed.2d at 581. Then:

> Pursuant to Texas Procedure the citation of the attorneys was reviewed by another state district judge, the respondent here, Judge Amos R. Meyers ...The court noted that it felt that the record supported a finding beyond a reasonable doubt...and as noted above, affirmed a finding of contempt ...but changed the original penalty to a fine-only sentence.

Id. at 582.

Following exhaustion of state court remedies, Maness filed a petition for a writ of

certiorari in this Court, but Maley, like petitioner here, sought federal habeas corpus which was granted by the district court. The Chief Justice then noted in Maness (Id. at 583):

> "An appeal has been filed from that judgment and is now pending before the United States Court of Appeals for the Fifth Circuit. On April 15, 1974, we granted the petition for a writ of certiorari; we are advised that the case is being held pending our decision in this case."

The decision in Maness thus implicitly recognized the propriety of the grant of the habeas corpus writ by the Texas federal court to Maley. The Chief Justice explicitly recognized the fact that the sentence imposed on both attorney-contemnors was "...a $500 fine with no confinement." Id. at 582.

Furthermore, the unique circumstances of an attorney's conviction for criminal contempt, whether a jail sentence is imposed or not, carry with it sufficiently unique restraints on the attorney's liberty to entitle an attorney to habeas corpus standing.

As the district court recognized, petitioner's criminal contempt conviction subjects him to disabilities and restraints far more serious than the loss of $25.00:

> It is not merely the original contempt citation which is before this court; Edmunds has been ordered to show cause why he should not be held in further contempt for failing to pay the fine imposed upon him. The consequences of the pending action

could be grave. An attorney's reputation is his principal professional asset; the success of his efforts often depends upon a delicate balance of harmony with the courts. A judgment of criminal contempt is something far more than a mere "normal restraint" to one who occupies the status of an officer of the court. Moreover, under Hawaii law there is at least the potential for disciplinary action being taken against an attorney who is found in contempt. 365 F.Supp. at 944(a). 5/

The court below found these concerns to be too speculative to constitute "custody." But they are no less speculative than those restraints where the custody requirement was satisfied by e.g., the option of paying a fine in lieu of incarceration. See, United States ex rel., Radich v. Criminal Court, 385 F.Supp. 165, 169 n.4 (S.D.N.Y. 1974).

Like the petitioner in Hensley v. Municipal Court, supra, petitioner:

> "...has been forced to fend off the state authorities by means of a stay, and those authorities retain the determination and the power to seize him as soon as the obstacle of the stay is removed. The need to keep the stay in force is itself an unusual and substantial impairment of his liberty." 411 U.S. at 352.

5/ In this respect, respondent's order to petitioner to show cause why he should not be held in further contempt acts as the functional equivalent of a detainer. See, Braden v.

Like Hensley, petitioner:

> "...cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense. The restraint on liberty is surely no less severe than the conditions imposed on the unattached reserve officer whom we held to be 'in custody' in Strait v. Laird, supra." 411 U.S. at 351.

See also, Walker v. Dillard, ___F.2d ___, No. 73-1108 (4th Cir. 1973) p.3, slip opinion (copy in Appendix at 26a-30a). And, it seems to us obvious that the damage to an attorney's professional reputation caused by a conviction for criminal contempt is a disability or restraint sufficient to confer habeas jurisdiction on the District Court. Cf. In Re Butts, 493 F.2d 842, 844 (5th Cir. 1974). 6/

5/ (continued)
Kentucky, supra at 488-489. See also, Feliciano v. Laird, 426 F.2d 424, 427 n.4 (2nd Cir. 1970).

6/ "Conviction for contempt of court could also have serious adverse career consequences ... His conviction could provide a basis for disciplinary action by a bar association. Opportunities for appointment to the bench or to other high office might be foreclosed as a result of this blot upon his record. The conviction might damage [his] reputation in the legal community, and this in turn might affect his ability to attract clients and represent

As observed by former Senior Circuit Judge Edgerton, in a closely related context in Kauffman v. Secretary of the Air Force, 415 F.2d 991, 996 (D.C. Cir. 1969):

> "The writ of habeas corpus has played a unique role in the system by affording the basis for ultimate Supreme Court review of constitutional errors ...To hold that collateral review is contingent on confinement in every case would arbitrarily condition... access to... review of constitutional errors upon a factor unrelated to the gravity of the offense..."

Accord, Jones v. United States, ___ U.S. ___, 42 L.Ed.2d 150, 152 (1974) (Douglas, J., dissenting).

The decision below having decided an important federal question in a manner in conflict with decisions of this Court, certiorari should be granted.

6/ (continued)
them effectively, especially in open court. In light of these possible collateral consequences [his] appeal is not 'abstract, feigned or hypothetical' so as to justify dismissal..." Butts, supra at 844.

II. Certiorari Should Be Granted Because The Decision Below Is In Conflict With Decisions Of The Fourth And Second Circuits.

Both the Fourth and Second Circuits permit federal habeas corpus review of state court criminal convictions in which a sentence imposed is effectively a "fine only sentence." Walker v. Dillard, ___ F.2d ___, No. 73-1108 (4th Cir. June 30, 1973) (a copy of the court's unreported opinion is set forth in the Appendix at 26a - 30a); United States ex rel., Horelick v. Criminal Court, 507 F.2d 37 (2nd Cir. 1974); Thistlethwaite v. City of New York, 497 F.2d 339 (2nd Cir. 1974), cert. den. ___ U.S. ___, 43 L.W. 3359 (Dec. 23, 1974); United States ex rel., Radich v. Criminal Court, 385 F.Supp. 165 (S.D.N.Y. 1974).

In Walker v. Dillard, supra, the petitioner sought federal habeas corpus review of a misdemeanor conviction rendered by a Virginia municipal court in which she "was sentenced to serve thirty days in jail and to pay a twenty-five dollar fine and costs. The jail term was suspended for six months." App., infra, p. 27a. The district court dismissed the petition on the ground that "a thirty day suspended sentence and a twenty-five dollar fine ...is not a sufficient 'restraint' to put the petitioner 'in custody' within the meaning of the habeas corpus statutes..." Walker v. Dillard, 353 F.Supp. 566, 570 (W.D. Va. 1972). On appeal the Fourth Circuit reversed. ___ F.2d ___. The court found that the possibility of a future restraint occasioned by possible activation of the suspended portion of the sentence for "any factor which the judge considers sufficient" was a restraint constituting

custody for federal habeas corpus purposes:

> "We think the rationale of Carafas and Hensley applies to the circumstances of this case. Even though at the time she filed the petition in the district court Walker was not incarcerated, time did remain on her suspended sentence. Under Virginia law the trial court clearly had the power to activate the thirty day sentence "for any cause deemed by it sufficient." Va.Code Ann. §53-275; Barry v. Commonwealth, 200 Va. 495, 106 S.E.2d 593 (1959). It is inconceivable that there are any significant differences in "restraints" on a man's liberty when he is released on bail, see Hensley, supra, than when he is released on a suspended sentence. In both situations a violation of any factor which the judge considers sufficient, subjects the defendant to incarceration. This is as much of a "restraint" on liberty as parole or probation. See Carafas v. LaVallee, supra; Walker v. North Carolina, 262 F.Supp. 102 (W.D.N.C. 1966), aff'd. on other grounds 372 F.2d 129 (4th Cir. 1967)." (App., infra, p. 29a).

There is no functional difference between the possible activation of Mary Walker's suspended sentence and the future proceedings envisioned by respondent's order to show cause directed to the petitioner here.

Similarly, the Second Circuit has consistently permitted review of sentences in which payment of a fine could be made in lieu of incarceration. In United States ex rel., Horelick v. Criminal Court, supra, the

petitioner had been sentenced on each of two counts "to pay a fine of $250 or serve 30 days in jail," 507 F.2d at 38 (emphasis added). The district court, in granting relief, 366 F.Supp. 1140, found the pendancy of such a sentence sufficient to constitute custody. The Second Circuit, although reversing on the merits, impliedly affirmed the district court's jurisdictional holding. And, in Thistlethwaite v. City of New York, supra, the appellants had been convicted in a state court and sentenced to pay a $10 fine or spend two days in jail. They paid the fine. In rejecting their suit brought under 42 U.S.C. §1983 to attack the statute under which they were convicted, the Second Circuit observed that "habeas corpus is generally available in situations similar to the one at hand." 497 F.2d at 343. See e.g., United States ex rel., Radich v. Criminal Court, supra at 167-168 & n.4 ("He was sentenced to pay a $500 fine or serve sixty days...") (emphasis added). See also, Thames v. Justices of Superior Court, 383 F.Supp. 41, 43 (D. Mass. 1974).

It seems clear that under either theory of custody which we have advanced in Point I, supra, that is, the "collateral consequences" which flow from a contempt citation or the actual restraints imposed upon petitioner by the judgment of contempt and the pendancy of the show cause proceedings, petitioner would have been afforded recognition of habeas jurisdiction in either the Fourth or Second Circuit.

Certiorari should therefore be granted to resolve this conflict.

John S. EDMUNDS,

Petitioner-Appellee,

v.

Robert WON BAE CHANG,
Individually and in his capacity as
Judge, First Circuit Court,
State of Hawaii,
Respondent-Appellant.

No. 74-1463.

United States Court of Appeals,
Ninth Circuit.

Jan. 2, 1975.

George Pai, Atty. Gen. of Hawaii, Honolulu, Hawaii, for respondent-appellant.

Paul N. Halvonik, of Friedman, Sloan & Halvonik, San Francisco, Cal., Burnham H. Greeley, Honolulu, Hawaii, for petitioner-appellee

Before LUMBARD,* KOELSCH and DUNIWAY, Circuit Judges.

KOELSCH, Circuit Judge:

The primary question on this appeal is whether a person against whom a fine has been

*The Honorable J. Edward Lumbard, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

imposed by a state court is "in custody" within the meaning of the federal habeas corpus statute, 28 U.S.C. §§ 2241, 2254. The district court, concluding that he is, proceeded to the merits of petitioner Edmunds' claim and granted a writ, 365 F.Supp. 941 (D. Hawaii 1973). 1/ We disagree on the jurisdictional question and, accordingly, reverse.

We are fully aware that the Supreme Court in recent years has extended the scope of the Great Writ to persons whose circumstances fall outside conventional notions of physical custody. See, e.g., Hensley v. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed. 2d 294 (1973); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973); Strait v. Laird, 406 U.S. 341, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972); Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968); Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L. Ed.2d 426 (1968); Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963).

In Hensley, the Court recognized the trend of its recent decisions, emphatically denouncing such interpretations of the habeas corpus statute as "would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." 411 U.S. at 350, 93 S.Ct. at 1574. It also put the custody requirement of the statute in perspective:

1/ The facts of this case are fully set forth in the district court's opinion.

> "The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." 411 U.S. at 351, 93 S.Ct. at 1574.

Applying these principles to the case before us, we conclude that there is insufficient "custody" present for the invocation of habeas corpus relief; the claimed restraints on Edmunds' liberty are neither severe nor immediate enough to justify the remedy.

The sole punishment confronting Edmunds is a $25 fine; there is no provision in the sentence for his confinement in the case of non-payment. True enough, a threat of incarceration is implicit in any court-imposed fine, for jail is one of the sanctions by which courts enforce their judgments and orders. Hence a fine may in some circumstances ultimately prove to be the price of freedom. But until confinement is imminent--as it was in Hensley where only a stay held off execution of the petitioner's one-year sentence--the "special urgency" justifying use of the habeas remedy is notably absent.2/

2/ That the instant case is not governed by the holding of Hensley is clear from the Supreme Court's statement of the issue there:

In this regard, we reject the district court's conclusion that the threat of confinement raised by a pending contempt proceeding based on Edmunds' failure to pay the fine supplies the requisite "custody"; should the stay presently in force be lifted, the resultant hearing could have any number of possible outcomes, only one of which is incarceration. At this juncture, confinement is no more than a speculative possibility--"the unfolding of events may render the entire controversy academic." Hensley, supra, at 352, 93 S.Ct, at 1575.3/

2/ (continued)
"The question presented for our decision is a narrow one: namely, whether the conditions imposed on petitioner as the price of his release constitute 'custody' as that term is used in the habeas corpus statute." 411 U.S. at 348, 93 S.Ct. at 1573 (emphasis added).
Cf. Huante v. Craven, 500 F.2d 1004 (9th Cir. 1974).

3/ Here we cannot say that the conclusion that petitioner is not in custody "would do no more than postpone this habeas corpus action until petitioner [has] begun service of his sentence." Hensley, supra, at 352, 93 S.Ct. at 1575. No sentence of confinement presently exists, and none may be forthcoming.

Neither do we agree that the possibility of disciplinary action against Edmunds provides the requisite "restraint on liberty." No showing has been made that such a proceeding is pending or even contemplated. Moreover, in view of the nature of the record upon which the conviction of contempt is based, the imposition of professional discipline appears most unlikely.4/

Nor do we agree that the existence of the contempt judgment amounts to a severe restraint on Edmunds' liberty because it injures his reputation as a lawyer or adversely affects the "delicate balance of [his] harmony with the courts." 365 F.Supp. at 944. He has made no showing of either of these supposed effects of the judgment, and such incidental professional disability as we may presume exists under the circumstances is insufficient to provide the requisite restraint.5/

4/ Of the six judges who have reviewed the facts claimed to constitute the contempt (the district judge and five justices of the Hawaii Supreme Court), three held the conduct contemptuous and three held it was not. Were we to reach the merits here, we might have considerable difficulty labelling the determination of the district court (that the conduct was not contemptuous) clearly erroneous.

5/ By the same logic, a taxi-driver might argue that he is "in custody" by reason of a fine for a traffic violation. Cf. Westberry v. Keith, 434 F.2d 623 (5th Cir. 1970).

What we have here is the imposition of a fine, pure and simple. We trust that whatever Congress meant by the word "custody" when it enacted the habeas corpus statute, it did not intend to authorize federal intervention into state judicial proceedings to review a "fine only" sentence. The Court has made clear in Hensley that the custody requirement exists to distinguish between "severe restraints on individual liberty" and those which are not severe. If the latter category does indeed exist, we are clear that a "fine only" sentence falls within it.6/

Reversed and remanded with instructions to dismiss the petition.

6/ We read neither Settler v. Yakima Tribal Court, 419 F.2d 486, 489-490 (9th Cir. 1969), cert. denied, 398 U.S. 903, 90 S.Ct. 1690, 26 L.Ed.2d 61 (1970), nor Weiss v. Burr, 484 F.2d 973 (9th Cir. 1973), as controlling.

In Yakima, this court held "that before the effective date of the Indian Civil Rights Bill, habeas corpus was available as a device to obtain review of decisions of the Yakima Tribal Court even where the one convicted was fined rather than given a prison sentence." Settler v. Lameer, 419 F.2d 1311, 1312 (9th Cir. 1969), cert. denied, 398 U.S. 903, 90 S.Ct. 1690, 26 L.Ed.2d 61 (1970). We observed in Yakima that the petitioner had "no other procedural recourse for effective judicial review of the constitutional issues he raises." 419 F.2d at 490 (emphasis added). Moreover, the provision of Settler's sentence providing for his suspension from fishing activities in the event he failed to pay the fine provided a significant restraint on his

---

6/ (continued)
liberty under all the circumstances of that case.

In Weiss, where the sentence on one of five counts of contempt was a fine only, we reviewed the propriety of all five convictions; but the issue of "custody" was neither argued nor discussed in the opinion.

John S. EDMUNDS, Petitioner,

v.

Robert Won Bae CHANG,
Individually and in his capacity as
Judge, First Circuit Court,
State of Hawaii, Respondent.

Civ. No. 73-3926.

United States District Court,
D. Hawaii.
Nov. 2, 1973.

David C. Schutter, Burnham H. Greeley, Padgett, Greeley, Marumoto & Steiner, Honolulu, Hawaii, for petitioner.

Robert P. Jaress, Deputy Atty. Gen., George Pai, Atty. Gen. of Hawaii, Honolulu, Hawaii, for respondent.

DECISION AND ORDER

SAMUEL P. KING, District Judge.

Petitioner Edmunds is an attorney licensed in the State of Hawaii. Respondent Chang is a judge of the First Circuit Court of Hawaii. On January 23, 1973, Edmunds was representing a defendant in a criminal case before Judge Chang. During the course of the proceedings,

he was found summarily to be in contempt of court. Later on the same day he was served with a written order and judgment of contempt, directing him to pay a fine of $25 within 48 hours. 1/ Before the expiration of that time,

---

1/ ORDER AND JUDGMENT OF CONTEMPT. The trial of the above-entitled cause having duly commenced on Monday, January 22, 1973; and

At the commencement of the further trial on Tuesday, January 23, 1973, after the court bailiff had opened court and as the Court was in the process of noting the presence of defendants, [sic] counsel, etc., and before the Court was able to utter a single word, Mr. John S. Edmunds, attorney for defendant Steven M. Hayashida, having stood up and interrupted the proceedings and requested permission to approach the Bench; and

The Court having requested the said Mr. Edmunds to be seated and having denied permission to approach the Bench, and the said Mr. Edmunds having refused to be seated but having continued to request permission to approach the Bench; and

The Court thereafter having ordered said Mr. Edmunds to be seated, and the said Mr. Edmunds having failed to comply with the order of the Court; and

The Court having found Mr. Edmunds in Contempt of Court for failure to obey the order of the Court to be seated and having fined the said Mr. Edmunds the sum of twenty-five dollars ($25.00), payable within forty-eight (48) hours; (footnote continued on next page)

Edmunds moved the court to reconsider its judgment, or in the alternative, to stay the order through January 30, so that he could seek appellate review. 2/ On January 29, he was ordered to appear before Judge Chang four days later to show cause why he should not be held in further contempt for failure to comply with the original contempt order.

(footnote 1/ continued)

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that based on the foregoing proceedings, the said Mr. John S. Edmunds is hereby found in Contempt of Court, and is hereby fined the sum of twenty-five dollars ($25.00), payable within forty-eight (48) hours from the filing of this Order and Judgment. [See file in State of Hawaii v. James Pokini, et al., Cr.No. 44262, First Circuit Court, State of Hawaii.]

2/ The motion was based on two grounds: 1) The judgment and order failed to specify the section of the contempt statute on which it purported to be based, although such specification is required by law; 2) Petitioner's conduct was insufficient as a matter of law to constitute contempt.

Edmunds alleges that on January 26 he asked what action Judge Chang proposed to take on the motion, and was told "you will be informed."

Direct appeal not being permitted,3/ Edmunds then sought a writ of prohibition from the Hawaii Supreme Court, and that court restrained Judge Chang from proceeding further while it considered the writ. The writ of prohibition was ultimately denied, in a 3-2 decision, and Edmunds is now before this Court applying for a writ of Habeas Corpus under 28 U.S.C. §2254.

Edmunds has exhausted his state remedies.

Still, the respondent argues that Edmunds cannot satisfy the requirements of §2254 4/ because "the sentence did not impose imprisonment."

The statute does not, on its face, require that there be a sentence of imprisonment before a federal court can assume habeas corpus jurisdiction. §2254 refers simply to "a person in custody pursuant to the judgment of a State court." The meaning of the custody requirement has been the subject of protracted debate, but there has been a tendency in

---

3/ Penal Code §1077(5); Act 9, Session Laws of Hawaii, 1972.

4/ 28 U.S.C. §2254(a): The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

the decided cases not to impose too rigid a limitation on the boundaries of federal jurisdiction. In Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963), the Supreme Court indicated that it "has generally looked to common-law usages and the history of habeas corpus both in England and in this country" to help determine availability of the writ. Jones emphasized the wide range of situations, extending even to child custody disputes, in which habeas corpus relief has been historically available. In this context, the Court concluded that the imposition of "restraints not shared by the public generally," and not only actual confinement, could justify issuance of the writ.

Although it did not attempt a specific delineation of those "restraints," the Court in Jones unanimously held that a parolee although released from custody was sufficiently deprived of his liberty to have access to habeas corpus. The decisive factor is that the conditions of parole "significantly restrain petitioner's liberty to do those things which in this country free men are entitled to do." Habeas corpus, furthermore,

> "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose - the protection of individuals against erosion of their right to be free from wrongfull restraints upon their liberty." 371 U.S. 243, 83 S.Ct. 377.

A steady trend toward liberalization of the custody requirement has followed Jones. A particularly important factor in many of these cases has been that of providing prompt adjudication of the petitioner's constitutional claims, one of the fundamental purposes of habeas corpus. See, e.g., Peyton v. Rowe, 391 U.S. 54, 88 S.Ct. 1549, 20 L.Ed.2d 426 (1968). Perhaps even more importantly, there has been an expansion in the spirit of the law, in the attitudes with which federal habeas corpus is to be considered. In Harris v. Nelson, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969), the Court declared:

> The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected. 394 U.S. 291, 89 S.Ct. 1086.

It is in this spirit that the Court has proceeded in its recent examination of the custody requirement. In Carafas v. LaVallee, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968), the petitioner was a former state prisoner who had been released after the expiration of his sentence. Strait v. Laird, 406 U.S. 341, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972) dealt with a military reservist on orders to report for active duty and seeking classification as a conscientious objector. He filed his petition in California, his home state; his "nominal custodian" was the commander of a personnel center in Indiana, where his records were kept. The petitioner

"was never in Indiana or assigned there." Nevertheless, the Court found that "[t]he concepts of 'custody' and 'custodian' are sufficiently broad" to provide a basis both for habeas corpus and for jurisdiction in California. Significantly, none of the other three dissenting Justices joined with Justice Rehnquist in the view that the petitioner was not in custody "at all."

The nature of the restraints to which the petitioner here is subjected are surely as severe as those in Strait. It is not merely the original contempt citation which is before this court; Edmunds has been ordered to show cause why he should not be held in further contempt for failing to pay the fine imposed upon him. The consequences of the pending action could be grave. An attorney's reputation is his principal professional asset; the success of his efforts often depends upon a delicate balance of harmony with the courts. A judgment of criminal contempt is something far more than a mere "moral restraint" to one who occupies the status of an officer of the court. Moreover, under Hawaii law there is at least the potential for disciplinary action being taken against an attorney who is found in contempt. 5/

5/ Rule 16, Unprofessional Conduct and Unauthorized Practice of Law, Rule of the Supreme Court of the State of Hawaii.

Finally, Edmunds points to very similar cases in which Judge Chang has found attorneys in contempt and then placed them in custody pending the payment either of the fine he has summarily levied or of a cash bail he has imposed. 6/

The rationale employed by the Supreme Court in Hensley v. Municipal Court, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973), finding "custody" where a habeas corpus petitioner has been released on his own recognizance, is just as compelling here:

> Plainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim. 411 U.S. 352-353, 93 S.Ct. 1575.

This steady widening of habeas corpus jurisdiction is underlined by the recent decision in Weiss v. Burr, 484 F.2d 973 (9th Cir., 1973). In Weiss, an attorney was cited on five separate contempt charges during the course of a state criminal trial. He sought habeas corpus relief, but it was denied in the District Court. The Court of Appeals, however, noted that "[t]he propriety of using a petition for habeas corpus to test the constitutionality of his convictions

---

6/ See n. 9.

is unquestionable," despite the fact that he was sentenced merely to pay a fine on one of the counts.

Therefore, bearing in mind the spirit and the logic which higher courts have recently applied to habeas corpus, as well as the circumstances of this case, I find that the petitioner is sufficiently in custody for this court to consider the constitutionality of his conviction.

The events which led to petitioner's contempt citation are here set out in full:

> BAILIFF: The Court of the Honorable Robert Won Bae Chang is now in session. Please be seated.
>
> THE COURT: Please be seated.
>
> MR. EDMUNDS: Your Honor, --
>
> THE COURT: Please be seated.
>
> MR. EDMUNDS: May I approach the bench, your Honor?
>
> THE COURT: Please be seated.
>
> MR. EDMUNDS: Your Honor, I have an --
>
> THE COURT: Please be seated, Mr. Edmunds.
>
> MR. EDMUNDS: -- issue I would like to raise.

> THE COURT: The Court orders you to be seated, Mr. Edmunds.
>
> MR. EDMUNDS: Your Honor, I'd like the record --
>
> THE COURT: If you do not be seated right now Mr. Edmunds, the Court will find you in contempt of Court.
>
> MR. EDMUNDS: May I approach the bench, your Honor?
>
> THE COURT: You are found in contempt of Court, Mr. Edmunds. The Court will stand at recess.

The contempt judgment entered by Judge Chang[7/] recites that Edmunds "stood up and interrupted the proceedings and requested permission to approach the bench"; that permission was denied, and that Edmunds "failed to comply with the order of the [c]ourt" which directed him to be seated. The nature of the proceeding which Edmunds is alleged to have interrupted is not stated; the judgment merely says that the court "was in the process of noting the presence of defendants [sic], counsel, etc."

There is no question that the circuit court of the state of Hawaii has statutory authority to punish some contempts summarily. Section 1077 of the state's recently adopted penal code 8/ merely restates a judicial power which

---

7/ Supra, n. 1. 365 F.Supp.-60.

8/ Supra, n. 3.

Blackstone thought "as ancient as the laws themselves" 4 Blackstone Commentaries 286. It might be pointed out that both the necessity for summary exercise of the power, and the assumption of its historical basis in the English common law, have been subjected to searching examination. See, e.g., the dissenting opinion of Justice Black in Green v. United States, 356 U.S. 165, 78 S.Ct. 632, 2 L.Ed.2d 672 (1958); Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); ABA Standards for Criminal Justice, The Function of the Trial Judge, Approved Draft, 1972, § 7.4. Nevertheless, the fact of the power remains.

It is also a power clearly reserved to the federal courts, under 18 U.S.C. § 401 and Rule 42(a), F.R.Cr.P. On both the state and federal levels, however, it must be ringed with constitutional inhibitions, since in the exercise of the power it is thought necessary to dispense with traditional safeguards afforded to those accused of all other offenses.

Rule 42(a), which authorizes summary punishment for contempt committed in the presence of the judge, does not confer a separate or expanded power on the federal courts. Its intent is merely "to make more explicit 'the prevailing usages at law' by which the statute has authorized punishment of contempts." Sacher v. United States, 343 U.S. 1, 7, 72 S.Ct. 451, 454, 96 L.Ed. 717 (1952). Moreover, its use is limited to "exceptional circumstances." Harris v. United States,

382 U.S. 162, 86 S.Ct. 352, 15 L.Ed.2d 240 (1965).

Thus, it is to § 401 that the federal courts must look for their contempt authority. However, since the Supreme Court has held that exercise of any broader contempt power than that allowed by the statute "would permit too great inroads on the procedural safeguards of the Bill of Rights," In Re Michael, 326 U.S. 224, 227, 66 S.Ct. 78, 79, 90 L.Ed.30 (1945), the Court's decisions construing § 401 must be seen as marking the outer limits of state contempt power as well.

"Exceptional circumstances" were surely present in the early case of Ex Parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405 (1888), which allowed punishment for contempt "without trial or further proof." In Terry, the wife of an attorney was ordered removed from the courtroom for disrupting the proceedings. As a marshal attempted to carry out the order, he was beaten and assaulted with a knife by the attorney. The attorney was subequently cited for contempt.

In less egregious situations, the Court's historic mistrust of summary punishment has led it to circumscribe use of the "Terry rule." Since the justification for the summary contempt power is "the need for immediate penal vindication of the dignity of the court," Cooke v. United States, 267 U.S. 517, 536, 45 S.Ct. 390, 395, 69 L.Ed. 767 (1925), the power can only be used to remove or prevent an "obstruction" which is "clearly shown."

Ex Parte Hudgings, 249 U.S. 378, 39 S.Ct. 337, 63 L.Ed. 656 (1919); In Re Michael, 326 U.S. 224, 66 S.Ct. 78, 90 L.Ed. 30 (1945).

In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948) further limits application of the rule to obstructions which present "'an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public' that, if 'not instantly suppressed and punished, demoralization of the court's authority will follow.'" Id. at 275, 68 S.Ct. at 508, quoting from Cooke v. United States, supra.

Such an "open threat" before the court can occur only where there is "misconduct . . . which disturbs the court's business . . . and where immediate punishment is essential to prevent 'demoralization of the cour't authority' before the public." Id. at 275, 68 S. Ct. at 509. If the alleged misconduct is merely language, it "'must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil . . ..'" In re Little, 404 U.S. 553, 555, 92 S.Ct. 659, 660, 30 L.Ed.2d 708 (1972), quoting Craig v. Harney, 331 U.S. 367, 376, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947).

What is particularly important in this case is that the alleged contemnor is an attorney who was engaged in the defense of a client. In Re McConnell, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962) involved an attorney who

persisted in a line of questioning which the court had already ruled inadmissible. When he was halted by the judge, he insisted on his right to ask the questions, and he announced his intention to continue doing so unless stopped by a bailiff. A summary contempt judgment against him was reversed. The Supreme Court reasoned that he had not actually persisted to the point where the bailiff was forced to interrupt the trial, and his mere announcement of his intention to do so could not be enough of an obstruction to sustain a judgment of contempt. The Court added:

> The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty. 370 U.S. 236, 82 S.Ct. 1292.

A lawyer is certainly under a legal, ethical and moral duty to observe a proper courtroom decorum. But his duty to exert himself on behalf of his client, within the bounds of that decorum, is just as compelling. The ABA Standards for Criminal Justice, The Defense Function, Approved Draft, 1971, has this to say, in section 7.1(d), on the subject of courtroom decorum:

> The lawyer should comply promptly with all orders and directives of the court, but he has a duty to have the record reflect adverse rulings or judi-

cial conduct which he considers prejudicial to his client's legitimate interests. He has a right to make respectful requests for reconsideration of adverse fulings.

If the entire line of cases in which the Supreme Court dealt with summary contempt leads inexorably to any single conclusion, it is this: because the Court is so wary of the power, and so conscious of its potential for abuse, it is determined, as it has reiterated time after time, to limit courts to "the least possible power adequate to the end proposed." Anderson v. Dunn, 6 Wheat. 204, 231 (19 U.S. 204), 5 L.Ed. 242 (1821), quoted in among others, In Re Michael, 326 U.S. 224, 66 S.Ct. 78, 90 L.Ed. 30 (1945); In Re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948); Cammer v. United States, 350 U.S. 399, 76 S.Ct. 456, 100 L.Ed. 474 (1956); Harris v. United States, 382 U.S. 162, 86 S.Ct. 352, 15 L.Ed.2d 240 (1965); Shillitani v. United States, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966).

That potential for abuse has been realized often enough to draw the attention of commentators as well as of appellate courts. See, e.g., Homan, Abuse of Attorneys by Judges, 14 Clev.-Mar.L.Rev. 79 (1965). It may well have animated Edmunds as he rose to address the court. From the record here, it cannot be said that any such concern would have been ill-founded. 9/

9/ Edmunds cites examples of this judge's

This case does not concern the limits to which an attorney may go in protesting an adverse ruling. Rather, the focus is on what he may do to get a ruling in the first place, and to make the record which may be so crucial to his client's liberty. It is therefore unlike Fisher v. Pace, 336 U.S. 155, 69 S.Ct. 425, 93 L.Ed. 569 (1949), where a lawyer was cited for deliberately persisting in a line of argument excluded by the court, and only after he had "twice refused to heed the court's admonition not to argue the point."

A court of law is not the personal fiefdom of the individual who happens to be sitting at the bench. The role of the lawyer defending one accused of crime is every bit as essential in our system of justice as that of the judge, and the courtroom is in many respects more the arena of the former than it is that of the latter. If a lawyer can be denied the opportunity even to address the court on the subject of what he conceives to be valid objection, it is hard to imagine what part of his function as advocate is left to him.

9/ (continued)
behavior toward lawyers who are trying to state objections for the record. These examples include the judge declaring a recess while the lawyer was still speaking, and then calling a new case when the court reconvened, as well as instructing the court reporter not to take the statements of a lawyer addressing the court.

He cannot be denied that opportunity, however, as the Supreme Court made perfectly clear in Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717 (1952):

> Of course, it is the right of counsel for every litigant to press his claim, even if it appears farfetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. 343 U.S. 9, 72 S.Ct. 455.

Edmunds' assertion that he spoke throughout in a "low and courteous tone" is not challenged. There is not the slightest indication that his conduct was in any way obstructive, or that it presented an immediate threat of obstruction. A judge who is looking for contempt will probably be inclined to find it, but the summary procedure provided by the Hawaii contempt statute cannot be used as authority for judges to overstep the constitutional limit of their power. The citation of contempt for an attorney's effort to speak before the court transgresses that limit.

It is therefore the holding of this court that petitioner John Edmunds was denied due process of law, as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States.

It is ordered that the judgment and order of the First Circuit Court of the State of Hawaii, dated January 23, 1973, holding petitioner Edmunds in contempt of court, is void and of no force or effect.

It is also ordered that petitioner Edmunds be released from any further proceedings had under the aforesaid void order and judgment.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-1108

Mary Walker,

Appellant,

versus

The Hon. George B. Dillard,
Judge, Municipal Court of
Roanoke,

Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke.
Ted Dalton, Chief Judge.

Submitted: May 15, 1973 Decided: June 20, 1973

MEMORANDUM DECISION

Mary Walker was convicted of a misdemeanor in the Municipal Court of the City of Roanoke, Virginia, on August 25, 1971, and was sentenced to serve thirty days in jail and to pay a twenty-five dollar fine and costs. The jail term was suspended for six months. On February 22, 1972, having exhausted state remedies, she filed a petition for a writ of habeas corpus in the district court alleging that her conviction was illegal because she was denied her constitutional right to a jury trial and that section 18.1-238 of the Virginia Code, under which she was convicted, is unconstitutional. Without reaching the merits of these allegations, the district court dismissed the petition on the ground that "a thirty day suspended sentence and a twenty-five dollar fine for abusive telephone conversation is not a sufficient 'restraint' to put the petitioner 'in custody' within the meaning of the habeas statutes (28 U.S.C.A. §§ 2241 and 2254)." Walker seeks a certificate of probable cause to appeal from this order. Since we feel the imposition of a suspended sentence does not deprive the district court of habeas corpus jurisdiction when the sentencing court retains the power to activate the sentence, we reverse the judgment and remand this case to the district court to consider the merits of the petition.

Under 28 U.S.C. § 2241(c) (3) federal courts have jurisdiction to entertain writs of habeas

corpus only if the petitioner is "in custody" in violation of the laws or Constitution of the United States While at one time federal judges might well have insisted on actual incarceration before exercising their authority to free state prisoners under this statute, recent Supreme Court decisions make clear that the "in custody" requirement does not necessarily mean actual physical detention in a jail or prison. Rather the term is to be liberally construed as meaning "restraints on a man's liberty, restraints not shared by the public generally. . . ." Jones v. Cunningham, 371 U.S. 236, 240 (1963). See also Hensley v. Municipal Court, ____ U.S. ____, 13 Crim.L.Rep. 3041 (April 18, 1973); Peyton v. Rowe, 391 U.S. 54 (1968); Carafas v. LaValle, 391 U.S. 234 (1968). The various continuing disabilities which necessarily result from a criminal conviction, Sibron v. New York, 392 U.S. 40 (1968), was a sufficient "restraint" of a person's liberty to lead the Court in Carafas v. LaVallee, supra, to hold that habeas jurisdiction over a timely brought petition was not defeated by the release of the prisoner prior to the determination of the habeas proceedings. The Court ruled that the case was not mooted by the prisoner's release while his case was pending insomuch as he still had a "substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him." 391 U.S. at 237 (citation omitted). Similarly, in the most recent examination of the problem, the court held in Hensley v. Municipal Court, supra, that "restraint" included a convicted

defendant's obligation to appear whenever and wherever ordered by any court or magistrate of competent jurisdiction, imposed as a condition of release on his own recognizance. Concluding that this "restraint" satisfied the "custody" requirement of § 2241 the court noted that "[p]lainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim."

We think the rationale of Carafas and Hensley applies to the circumstances of this case. Even though at the time she filed the petition in the district court Walker was not incarcerated, time did remain on her suspended sentence. Under Virginia law the trial court clearly had the power to activate the thirty day sentence "for any cause deemed by it sufficient." Va.Code Ann. § 53-275; Barry v. Commonwealth, 200 Va. 495, 106 S.E.2d 593 (1959). It is inconceivable that there are any significant differences in "restraints" on a man's liberty when he is released on bail, see Hensley, supra, than when he is released on a suspended sentence. In both situations a violation of any factor which the judge considers sufficient, subjects the defendant to incarceration. This is as much of a "restraint" on liberty as parole or probation. See Carafas v. LaVallee, supra; Walker v. North Carolina, 262 F.Supp. 102 (W.D.N.C. 1966), aff'd. on other grounds 372 F.2d 129 (4th Cir. 1967).

Accordingly, a certificate of probable cause to appeal is granted. The judgment of the district court is reversed and the case is remanded for proceedings not inconsistent with this opinion.

/s/ J. Braxton Craven
United States Circuit Judge

/s/ John D. Butzner
United States Circuit Judge

/s/ Donald Russel
United States Circuit Judge

Supreme Court, U. S.
FILED
JUN 27 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1284

JOHN S. EDMUNDS,

Petitioner,

vs.

ROBERT WON BAE CHANG
JUDGE, FIRST CIRCUIT COURT
STATE OF HAWAII

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

RONALD Y. AMEMIYA
Attorney General
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

WALTER G. CHUCK
Suite 200
1022 Bethel Street
Honolulu, Hawaii 96813

Attorneys for Respondent.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1284

JOHN S. EDMUNDS,

Petitioner,

VS.

ROBERT WON BAE CHANG
JUDGE, FIRST CIRCUIT COURT
STATE OF HAWAII

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

RONALD Y. AMEMIYA
Attorney General
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

WALTER G. CHUCK
Suite 200
1022 Bethel Street
Honolulu, Hawaii 96813

Attorneys for Respondent.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Reasons for Denying the Writ	4
I. There is no Conflict between the Decision Below and Applicable Decisions of this Court on the Scope of Federal Habeas Corpus Relief	4
II. There is no Conflict between the Decision Below and the Decisions of the Fourth and Second Circuits	12
III. This Court should not Interfere with the Procedure of the State Court unless There is a Clear and Convincing Case of a Violation of a Constitutional Right or Federal Statute	14
Conclusion	16
Appendix	17
Certificate of Service	19

TABLE OF AUTHORITIES

Cases	Page
Braden vs. Kentucky, 410 U.S. 484 (1973)	5, 6
Carafas vs. LaVallee, 391 U.S. 234 (1968)	5, 6
Hammond vs. Lenfest, 398 F. 2d 705 (2d Cir. 1968)	10
Hensley vs. Municipal Court, 411 U.S. 345 (1973)	4, 5, 7, 8 10, 13
Humphrey vs. Cady, 405 U.S. 504 (1972)	5
Jones vs. Cunningham, 371 U.S. 236 (1963)	5, 7, 8
Maness vs. Meyers, _____ U.S. _____, 42 L. Ed. 2d 574 (1975)	11, 14
McNally vs. Hill, 293 U.S. 131 (1934)	6
Peyton vs. Rowe, 391 U.S. 54 (1968)	5, 6
State of Hawaii vs. James Pokini, et al., Cr. No. 44262 (Circuit Court of the First Circuit, State of Hawaii)	2
Strait vs. Laird, 406 U.S. 341 (1972)	5, 7, 8, 10
Thistlethwaite vs. City of New York, 497 F. 2d 339 (2d Cir.), cert. den., _____ U.S. _____, 43 L.W. 3359 (Dec. 23, 1974)	13
United States ex rel. Horelick vs. Criminal Court, 507 F. 2d 37 (2d Cir. 1974)	13
United States ex rel. Radich vs. Criminal Court, 385 F. Suppl. 165 (S.D.N.Y. 1974)	13
Walden vs. Wainwright, 390 U.S. 335 (1968)	6
Walker vs. Dillard, _____ F. 2d _____, No. 73-1108 (4th Cir. June 20, 1973)	12

Statutes

28 U.S.C. § 1257(3)	11, 15
28 U.S.C. § 2241(c)	2, 4
28 U.S.C. § 2254(a)	2, 4, 12
Hawaii Penal Code § 1077	2

Miscellaneous

9 W. Holdsworth, *A History of English Law*, 108-125 (1938)	6
Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970)	4, 6

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1284

JOHN S. EDMUNDS,

Petitioner,

vs.

ROBERT WON BAE CHANG
JUDGE, FIRST CIRCUIT COURT
STATE OF HAWAII

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Appendix pp. 1a–7a of Petition) is reported at 509 F. 2d 39. The opinion of the District Court (Appendix pp. 8a–25a of Petition) is reported at 365 F. Supp. 941.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the imposition of a fine as a sentence for criminal contempt, without an additional or alternative sentence of confinement, is sufficient to constitute "custody" within the meaning of the federal habeas corpus statutes, 28 U.S.C. §§ 2241 and 2254.

STATUTES INVOLVED

This case involves the interpretation of the custody requirement of 28 U.S.C. §§ 2241 and 2254.

STATEMENT OF THE CASE[1]

On January 23, 1973, Petitioner, an attorney, was representing a defendant in a state criminal trial[2] in which the Respondent was judge. After the bailiff had opened court, and as the court was about to begin the process of calling the case, noting the presence of defendants, counsel, jury, etc.; but before the calling of the case by the clerk or any word by the court,the colloquy between Petitioner and Respondent occurred as reported in the Petition (pp. 3–4).

Later on the day of the twenty-third, Petitioner was served with an order holding him in criminal contempt and directing him to pay a fine of twenty-five dollars within forty-eight hours. The judgment contained no additional or alternative sentence to confinement or any other punishment. Before the expiration of that time, Petitioner moved Respondent to reconsider his judgment. No action was taken on that motion. On January 29, 1973, Petitioner was ordered to appear before Respondent four days later to show cause why he should not be held in further contempt for failure to comply with the original contempt order. Petitioner then sought a writ of prohibition from the Hawaii Supreme Court.[3] That court restrained Respondent from pro-

---

[1] The statement of the case is taken substantially from the opinions below.

[2] *State of Hawaii vs. James Pokini, et al.*, Cr. No. 44262 (Circuit Court of the First Circuit, State of Hawaii).

[3] There is no direct appellate review of criminal contempt sentences under the Hawaii state court procedure. See Hawaii Penal Code, § 1077(5). (Appendix, infra p. 17).

ceeding further while it considered the writ. When the Hawaii Supreme Court denied the writ[4] Petitioner applied to the United States District Court for the District of Hawaii for a writ of habeas corpus to review the lawfulness of the contempt. The district court issued a restraining order against Respondent and ultimately issued the writ. Respondent appealed to the United States Court of Appeals for the Ninth Circuit which reversed the district court on the jurisdictional question which is presented here for review:

> The primary question on this appeal is whether a person against whom a fine has been imposed by a state court is 'in custody' within the meaning of the federal habeas corpus statute, 28 U.S.C. §§ 2241, 2254. The district court, concluding that he is, proceeded to the merits of petitioner Edmunds' claim and granted a writ. 365 F. Supp. 941 (D. Hawaii 1973). We disagree on the jurisdictional question and, accordingly, reverse. Appendix, pp. 1a–2a of the Petition.
>
> . . . we conclude that there is insufficient 'custody' present for the invocation of habeas corpus relief; the claimed restraints on Edmunds' liberty are neither severe nor immediate enough to justify the remedy. Appendix, p. 3a of the Petition.
>
> We trust that whatever Congress meant by the word 'custody' when it enacted the habeas corpus statute, it did not intend to authorize federal intervention into state judicial proceedings to review a 'fine only' sentence. The custody requirement exists to distinguish between 'severe restraints on individual liberty' and those which are not severe. If the latter category does indeed exist, we are clear that a 'fine only' sentence falls within it. (Footnotes omitted) Appendix p. 6a of the Petition.

Execution of the state court judgment has been restrained by a series of orders from the various courts involved, the last order being a stay of mandate issued by the Court below on March 4, 1975.

---

[4] The 3-2 decision of the Hawaii Supreme Court denying the writ of prohibition is reported at 54 Hawaii Rep. _____, 512 P. 2d. 3 (1973). There is no question that petitioner has exhausted his state remedies *as to the $25 fine*.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Between the Decision Below and Applicable Decisions of This Court on the Scope of Federal Habeas Corpus Relief

As Petitioner correctly points out, 28 U.S.C. § 2254(a) provides that the writ of habeas corpus is available to:

> . . . a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

The various grounds on which the writ may otherwise be granted are stated in 28 U.S.C. § 2241, and the ground specified in § 2254(a) is the ground initially stated in 28 U.S.C. § 2241(c) (3):

> § 2241 Power to grant writ
>
> - - - -
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> - - - -
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States;

The phrasing of 28 U.S.C. § 2241(c) (3), which is repeated in 28 U.S.C. § 2254(a), has two factors inherent in it: the nature of the governmental illegality alleged (i.e. the violation), and the type of restraint to which a petitioner has been subjected (i.e. the custody).[5] The petition here before this Court does not concern itself with the "violation" factor. The court below did not reach that issue. Therefore, and contrary to Petitioner's implication (Petition, p. 2), the question before this Court is not a Constitutional one, but one of statutory interpretation, namely: the narrow issue of the scope of the "custody" requirement of the aforementioned habeas corpus statute. Of this requirement this Court recently stated in *Hensley vs. Municipal Court*, 411 U.S. 345 (1973):

---

[5] See generally, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1040 (1970).

> The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty. Since habeas corpus is an extraordinary remedy whose operation is to a large extent uninhibited by traditional rules of finality and federalism, its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate. *Id.* at 351.

In *Jones vs. Cunningham*, 371 U.S. 236 (1963) this Court first recognized that severe restraints could be legal rather than physical.

> While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in . . . 'custody' . . . within the meaning of the habeas corpus statute. *Id.* at 243.

Jones as a parolee was subject to four types of restraint. He was restricted in his lawful physical movement. He was restricted in other matters which required the approval or supervision of his parole officer. He was threatened with reincarceration for the duration of his original sentence for even the slightest violation of the regulations. Lastly, he could be ordered back to prison for violations of parole regulations without a judicial hearing. [*Id.* at 242] [See also *Humphrey vs. Cady*, 405 U.S. 504 (1972)] An extension made by this Court since *Jones* has been founded on similar restraints, but no case cited by Petitioner or decided by this Court extends *Jones* to the confines of this case.

With *Jones* as a point of departure, Petitioner cites five decisions[6] of this Court as authority that the decision below is a retreat from this Court's expanded interpretation of the Great Writ. Respondent cannot agree that a retreat has been made for the simple reason that this Court has never occupied the ground prayed for by Petitioner.

In *Peyton, Carafas,* and *Braden, supra,* the restraint was the traditional one of imprisonment. These decisions did not rule on the na-

---

[6] *Peyton vs. Rowe*, 391 U.S. 54 (1968); *Carafas vs. LaVallee*, 391 U.S. 234 (1968); *Strait vs. Laird*, 406 U.S. 341 (1972); *Braden vs. Kentucky*, 410 U.S. 484 (1973); *Hensley vs. Municipal Court*, 411 U.S. 345 (1973). [Petition, p. 8].

ture of the restraint, for there was no question that it was imprisonment and imprisonment is the ancient impetus for the existence of the writ.[7] [9 W. Holdsworth, *A History of English Law* 108-25 (1938)]. What they did rule on was peripheral matters surrounding the restraint of imprisonment.

Peyton found on both historical and policy grounds that the prematurity rule as stated in *McNally vs. Hill* 293 U.S. 131 (1934) was ill-founded.[8] In *McNally*, this Court determined that a prisoner serving the first of two consecutive sentences could not attack the second on habeas corpus. [*Walden vs. Wainwright*, 390 U.S. 335, 336 (1968)]. Without abandoning the doctrine entirely, *Peyton* nevertheless greatly limited the situations seen as premature. *Peyton* stands not so much for an expanded interpretation of the Great Writ, as for a removal of a modern restriction.

In *Carafas*, this Court stated:

> The issue presented, then, is whether the expiration of petitioner's sentence, before his application was finally adjudicated and while it was awaiting appellate review, terminates federal jurisdiction with respect to the application. [391 U.S. at 237]
>
> - - - -
>
> . . . we conclude that under the statutory scheme, once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to the completion of proceedings of such application. [*Id.* at 238]

It was not a question of the nature of the restraint that faced the Court, but rather a question of whether jurisdiction, having once attached, through the restraint of imprisonment, could be defeated by the termination of the restraint.

Likewise is *Braden* not in conflict with the decision below. In *Braden*, the petitioner was imprisoned in Alabama.

> He applied to the District Court for the Western District of Kentucky for a writ of federal habeas corpus, alleging denial of his

[7] It was the application of the Habeas Corpus ad subjiciendum et recipiendum to the case of persons committed to prison by the Council, which suggested the use of the writ for the protection of the liberty of the subject. *Id.* at 111.

[8] *Developments in the Law, supra*, note 5, pp. 1087–1093.

> constitutional right to a speedy trial . . . and praying that an order issue directing respondent to afford him an immediate trial on a then three-year old Kentucky indictment. [This Court is] to consider whether, as petitioner was not physically present within the territorial limits of the District Court for the Western District of Kentucky, the provision of 28 U.S.C. § 2241(a) that '[w]rit of habeas corpus may be granted by the . . . district court . . . *within their respective jurisdictions*' [Court's emphasis], precluded the District Court from entertaining petitioner's application. 410 U.S. at 485–486.

This Court's conclusion was that:

> The writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody. [*Id.* at 494–495]
>
> - - - -
>
> Read literally, the language of § 2241(a) requires nothing more than that the court issuing the writ have jurisdiction over the custodian. So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim or requiring that he be released outright from custody, even if the prisoner himself is confined outside the court's territorial jurisdiction. [*Id.* at 495]

This Court went on to state that the prisoner's warden in Alabama acted as the agent for Kentucky in holding the prisoner subject to Kentucky's detainer.

Respondent would agree that the remaining two decisions by this court[9] cited by Petitioner may be extensions of *Jones* and apposite to the decision below, but finds them neither in conflict with the decision below nor approaching the parameters of Petitioner's case. In *Jones, supra*, petitioner had been imprisoned, was out on parole, and was subject to restrictions of physical movement, supervision by a parole officer, threat of reincarceration for the slightest violation of parole regulations, and imprisonment for violation of parole regu-

[9] *Hensley vs. Municipal Court*, 411 U.S. 345 (1973); and *Strait vs. Laird*, 406 U.S. 341 (1972).

lations without a judicial hearing. *Hensley* was almost the same case, except on the other side of the term of imprisonment. In *Hensley*, the petitioner had been sentenced to a year in jail (and fined $625), but without having begun to serve his sentence, he was released on his own recognizance and was granted an order staying execution of his sentence. The California Penal Code provided the following restrictions as stated by this Court:

> (a) He will appear at all times and places as ordered by the court or magistrate releasing him and as ordered by any court in which, or any magistrate before whom, the charge is subsequently pending.
>
> (b) If he fails to so appear and is apprehended outside of the State of California, he waives extradition.
>
> (c) Any court or magistrate of competent jurisdiction may revoke the order of release and either return him to custody or require that he give bail or other assurance of his appearance.... Cal Penal Code § 1318.4.
>
> A defendant is subject to re-arrest if he fails to appear as agreed, id., § 1318.8(a), and a willful failure to appear is itself a criminal offense. Id., § 1319.6. We assume that these statutory conditions have been imposed on petitioner at all times since the state trial court stayed execution of his sentence. [411 U.S. at 348.]

This Court first found the restraints similar to those in *Jones* and no less severe than those imposed on the petitioner in *Strait vs. Laird, supra.* [411 U.S. at 352] Then:

> Second, petitioner remains at large only by the grace of a stay entered first by the state trial court and then extended by two Justices of this Court. The State has emphatically indicated its determination to put him behind bars, and the State has taken every possible step to secure that result. His incarceration is not, in other words, a speculative possibility that depends on a number of contingencies over which he has no control. This is not a case where the unfolding of events may render the entire controversy academic. The petitioner has been forced to fend off the state authorities by means of a stay, and those authorities retain the determination and the power to seize him as soon as the obstacle of the stay is removed. The need to keep the stay in force is itself an unusual and substantial impairment of his liberty.

Moreover, our conclusion that the petitioner is presently in custody does not interfere with any significant interest of the State. Indeed, even if we were to accept respondent's argument that petitioner is not in custody, that result would do no more than postpone this habeas corpus action until petitioner had begun service of his sentence. It would still remain open to the District Court to order petitioner's release pending consideration of his habeas corpus claim. Even if petitioner remained in jail only long enough to have his petition filed in the District Court, his release by order of the District Court would not jeopardize his 'custody' for purposes of a habeas corpus action. Plainly, we would badly serve the purposes and the history of the writ to hold that under these circumstances the petitioner's failure to spend even 10 minutes in jail is enough to deprive the District Court of power to hear his constitutional claim. (Citations and footnotes omitted.) *Id.* at 352–353.

As the court below recognized:

> The sole punishment confronting Edmunds is a $25 fine; there is no provision in the sentence for his confinement in the case of non-payment. True enough, a threat of incarceration is implicit in any court-imposed fine, for jail is one of the sanctions by which courts enforce their judgments and orders. Hence a fine may in some circumstances ultimately prove to be the price of freedom. But until confinement is imminent—as it was in *Hensley* where only a stay held off execution of the petitioner's one-year jail sentence—the 'special urgency' justifying use of the habeas remedy is notably absent.
>
> In this regard, we reject the district court's conclusion that the threat of confinement raised by a pending contempt proceeding based on Edmunds' failure to pay the fine supplies the requisite 'custody'; should the stay presently in force be lifted, the resultant hearing could have any number of possible outcomes, only one of which is incarceration. At this juncture, confinement is no more than a speculative possibility—'the unfolding of events may render the entire controversy academic.' *Hensley, supra,* at 352.

Neither do we agree that the possibility of disciplinary action against Edmunds provides the requisite 'restraint on liberty.' No showing has been made that such a proceeding is pending or even contemplated. Moreover, in view of the nature of the record upon which the conviction of contempt is based, the imposition of professional discipline appears most unlikely.

Nor do we agree that the existence of the contempt judgment amounts to a severe restraint on Edmunds' liberty because it injures his 'delicate balance of [his] harmony with the courts.' 365 F. Supp. at 944. He has made no showing of either of these supposed effects of the judgment, and such incidental professional disability as we may presume exists under the circumstances is insufficient to provide the requisite restraint. (Footnotes omitted) (Appendix of Petition, pp. 3a–5a)

Strait vs. Laird, supra, was decided under 28 U.S.C. § 2241(c) (1) and not (c) (3).

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof.

Strait did not involve state custody, but, as to the custody requirement, may be akin to *Hensley* if active duty in the armed services is correlative to imprisonment. In *Strait,* this Court said:

> We held in *Schlanger* [*vs. Seamens,* 401 U.S. 487 (1971)] that, while an active-duty serviceman in such a status might be in military 'custody,' see *Donigan vs. Laird,* 308 F. Supp. 449 (Md. 1969), his custodian may not be deemed present .... 406 U.S.C. at 344.

See also *Hammond vs. Lenfest,* 398 F. 2d 705 (2d Cir. 1968). As in *Hensley,* the petitioner in *Strait* was on the verge of "imprisonment" and the custodian had taken all steps toward that "imprisonment."

> [Strait] is an Army Reserve officer not on active-duty. His active duty obligations were deferred .... on March 5, 1970, he was ordered to report for active duty ... beginning April 13, 1970. 406 U.S. at 341–342.

The cases above, then, all center on the restraint of imprisonment, and where the petitioner had not yet been imprisoned, the custodian had taken all steps short of imprisonment. As the decision below recognizes, in this case:

> At this juncture, confinement is no more than a speculative possibility—'the unfolding of events may render the entire controversy academic.' (Appendix of Petition, p. 4a).

There is one further decision cited by petitioner with which respondent must contend if he is to show that petitioner has failed in his claim that the decision below is in conflict with applicable decisions of this Court. That is the recent case of *Maness vs. Meyers,* _____ U.S. _____, 42 L. Ed. 2d 574 (1975). Petitioner states that the decision below "is at odds with the attitude expressed by this Court" (Petition, p. 8) in *Maness,* and that *Maness* "implicitly recognized the propriety of the grant of the habeas corpus writ by the Texas federal court to Maley." (Petition, p. 9). Petitioner reads too much into this Court's opinion. It is true that the two attorneys in the Texas contempt proceedings were then subject only to a $500 fine.[10] But the case that was before this Court was Maness' and it had been brought up not through seeking a writ of habeas corpus in a federal district court, but directly on writ of certiorari under 28 U.S.C. § 1257(3) which reads:

> § 1257. State courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, ... where any title, right, privilege or immunity is specially set up or claimed under the Constitution ....

Petitioner in *Maness* was claiming a breach by Texas of the Fifth Amendment. This Court was not there faced with habeas corpus requirements, and all that it said in regards to habeas corpus was by way of giving the background of the case.

We do not know if the custody requirement of jurisdiction was argued in Maley's case in federal district court. We do not know whether the United States Court of Appeals for the Fifth Circuit

---

[10] 42 L. Ed. 2d at 582.

would have reversed the district court's granting of the petition for a writ of habeas corpus on the point of "custody." We do know that the case was not before this Court and this Court did not hold that a $500 fine was a restraint that would cause a federal court to have jurisdiction to entertain an application for a writ of habeas corpus under 28 U.S.C. § 2254(a).

There being no conflict between the decision below and applicable decisions of this Court, certiorari should be denied.

II. There Is No Conflict Between the Decision Below and the Decision of the Fourth and Second Circuits

Contrary to Petitioner's statement, the decision below is not in conflict with decisions of the Fourth and Second Circuits and Petitioner cites no decision indicating that either of those circuits would have granted a writ of habeas corpus under the circumstances of Petitioner's case.

The case cited from the Fourth Circuit, *Walker vs. Dillard*, _____ F. 2d _____, No. 73-1108 (4th Cir., June 30, 1973) (set forth in Petition, pp. 26a–30a), is crucially different from the case below in that in *Walker* the petitioner had been sentenced to serve thirty days in jail. As the petition for certiorari in this case itself points out at p. 14, the Fourth Circuit's holding was grounded on its finding that:

> Under Virginia law the trial court clearly had the power to activate the thirty day sentence 'for any cause deemed by it sufficient.' *Va. Code Ann.* § 53-275; Barry vs. Commonwealth, 200 Va. 495, 106 S.E. 2d 593 (1959). It is inconceivable that there are any significant differences in 'restraints' on a man's liberty when he is released on bail, see *Hensley, supra*, than when he is released on a suspended sentence. In both situations a violation of any factor which the judge considers sufficient, subjects the defendant to incarceration.

In the case below, Petitioner had neither been released on bail nor on a suspended sentence. There was simply no sentence of incarceration to activate, for the only penalty levied had been a $25 fine. The language of the case cited from the Fourth Circuit clearly shows that that circuit would not have granted the writ of habeas corpus in the case below.

The three cases[11] cited from the Second Circuit all concern sentences phrased in the alternative, i.e. a fine, *or* imprisonment. But in *Horelick* and *Radich*, the petitioners had not paid the fine and were subject to imminent imprisonment while in *Thistlethwaite*, the language cited as authority is but dicta and in the context of that case is not in conflict with the decision below.

In *Horelick*, Petitioner had been ordered to surrender [366 F. Supp. at 1142].

> The first question presented by respondents, whether Horelick is 'in custody' although he has not yet surrendered to serve his jail term, has been answered adversely to their position by a decision of the Supreme Court handed down since the papers on the motion were submitted. *Id.*

Citing *Hensley, supra*, and stating this Court's holding therein, the district court found the two situations indistinguishable and stated in a footnote that:

> Respondents conceded prior to the *Hensley* decision that a ruling in that case would be applicable to the case at hand. *Id.*

Similarly, in *Radich* the petitioner had been released on bail. *Radich, supra* at 168.

In *Thistlethwaite*, the court's comment regarding habeas corpus can best be considered in the following context of that case:

> The judge below, in reaching his decision, concluded that since there is no doubt that state forums can be appropriate for the determination of issues arising under the Federal Constitution, if an issue is argued before a state tribunal, its resolution at that level carries with it all the usual effects of res judicata required by full faith and credit. Thus, while it is clearly a federal policy to allow to every plaintiff with a colorable claim his day in court, it is equally clearly not a court's duty to encourage career litigants by allowing federal duplication of state trials. Thus, the District Court concluded, where there has been a clear election by the plaintiff of the state forum, that court' decision may, under the concepts

---

[11] *United States ex rel Horelick vs. Criminal Court*, 507 F. 2d 37 (2d Cir. 1974); *United States ex rel Radich vs. Criminal Court*, 385 F. Supp. 165 (S.D.N.Y. 1974); *Thistlethwaite vs. City of New York*, 497 F. 2d 339 (2d Cir.), cert. den. _____ U.S. _____, 43 L.W. 3359 (Dec. 23, 1974)

of res judicata, preclude a new consideration of the Constitutional claims by federal courts in a suit under the Civil Rights Act.

Appellants vigorously contest his conclusion. It is argued . . . Finally it is argued that there can be no election of forum in a criminal action, and that it is improper to require a defendant to stand mute in the dock to avoid 'electing' against his right to a federal forum, 497 F. 2d at 341.

In considering that argument the court said:

It is contended that a criminal defendant is given no choice as to the time and the place of his prosecution. The picture is presented to us of a prisoner in the dock standing mute for fear of losing his right to a federal adjudication of his constitutional claims. We are not convinced that an election of the state tribunal is required to hold the present action barred by collateral estoppel.

. . . . However, in connection with this argument there are two matters that should be raised in passing. First, ...

Second, it should be noted that habeas corpus is generally available in situations similar to the one at hand. Should the appellants show 'possible adverse collateral effects' of their conviction, they can gain a federal hearing by that route. [Citing *Carafas, supra*]. *Id.* at 342-343.

The comment regarding habeas corpus is clearly dicta, is much qualified by the words "generally" and "similar", and was merely "raised in passing." Clearly, the "possible adverse collateral effects" envisioned by the Second Circuit were not those minimal effects present in the case below and there is no conflict on the question between the Ninth and Second Circuits.

III. This Court Should Not Interfere With The Procedure Of The State Court Unless there Is A Clear And Convincing Case Of A Violation Of A Constitutional Right Or Federal Statute

The case at hand is unlike the factual situation in the *Maness* case, *supra*, in which the paramount question involved was whether counsel in advising his client of his rights under the Fifth Amendment could by giving the wrong advice himself be subject to contempt if his client followed his advice. No such jeopardy to our judicial system appears in this case for the Respondent in this case was merely trying

to conduct an orderly and proper method of handling a case at trial before a jury. No problem of preventing an attorney from making an argument or statement on behalf of his client is involved for the problem was merely one of putting into the record the necessary preliminary information before permitting the Petitioner to address the court.

This matter was adequately and fairly handled by the highest court in the State of Hawaii in a manner which the Petitioner has not claimed to be erroneous for he did not request a Writ of Certiorari under 28 U.S.C. § 1257(3) after the decision on the Writ of Prohibition by the Supreme Court of the State of Hawaii. The Petitioner has had an adequate and complete review of the merits of his case by the State court and this Court, therefore, should not interfere with the procedures of the State court in the absence of presenting a clear and convincing showing of custody or violation of his constitutional right.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

RONALD Y. AMEMIYA
Attorney General
State of Hawaii
State Capitol
Honolulu, Hawaii 96813

WALTER G. CHUCK
Special Deputy Attorney General
Suite 200
1022 Bethel Street
Honolulu, Hawaii 96813

Attorneys for Respondent

APPENDIX
HAWAII PENAL CODE

Sec. 1077—Criminal Contempt of Court.

(1) A person commits the offense of criminal contempt of court if:

(a) He recklessly engages in disorderly or contemptuous behavior, committed during the sitting of a court in its immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due to its authority; or

(b) He creates a breach of peace or a disturbance with intent to interrupt a court's proceedings; or

(c) As an attorney, clerk or other officer of the court, he knowingly fails to perform or violates a duty of his office, or knowingly disobeys a lawful directive or order of a court; or

(d) He knowingly publishes a false report of a court's proceedings; or

(e) Knowing that he is not authorized to practice law, he represents himself to be an attorney and acts as such in a court proceeding; or

(f) He intentionally records or attempts to record the deliberation of a jury; or

(g) He intentionally disobeys or resists the process, injunction, or other mandate of a court; or

(h) He intentionally refuses to be qualified as a witness in any court or, after being qualified, to answer any proper interrogatory without a privilege to refuse to answer; or

(i) Being a juror, he intentionally, without permission of the court, fails to attend a trial or official proceeding to which he has been summoned or at which he has been chosen to serve.

(2) Except as provided in subsection (3), criminal contempt of court is a misdemeanor.

(3) The court may treat the commission of an offense under subsection (1) as a petty misdemeanor, in which case:

(a) If the offense was committed in the immediate view and

presence of the court, or under such circumstances that the court has knowledge of all of the facts constituting the offense, the court may order summary conviction and disposition; and

- - - -

(5) Whenever any person is convicted of criminal contempt of court or sentenced therefor, the particular circumstances of the offense shall be fully set forth in the judgment and in the order or warrant of commitment. In any proceeding for review of the judgment, sentence or commitment, no presumption of law shall be made in support of the jurisdiction to render the judgment, pronounce the sentence, or order the commitment. A conviction under subsection (3)(a) shall not be subject to review by direct appeal.

- - - -

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Brief in Opposition were served upon the following person by mailing the same to him, postage prepaid, this date:

MELVIN L. WULF, *Esq.*
American Civil Liberties
Union Foundation
22 East 40th Street
New York, N.Y. 10016

Attorney for Petitioner.

Dated: Honolulu, Hawaii

WALTER G. CHUCK

Attorney for Respondent.